

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of) DOCKET FILE COPY ORIGINAL
)
Amendment of Section 73.202(b),) MB Docket No. 02-376
Table of Allotments,) RM-10617
FM Broadcast Stations) RM-10690
(Sells, Willcox, and Davis-Monthan)
Air Force Base, Arizona)

RECEIVED

JUL 28 2005

To: Office of Secretary
Attn: Chief, Audio Division,
Media Bureau

Federal Communications Commission
Office of Secretary

OPPOSITION TO MOTION AND
REPLY TO SUPPLEMENT

Lakeshore Media, LLC ("Lakeshore"), licensee of Station KWCX-FM, Willcox, Arizona, by its counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby opposes the Motion to Accept Supplement filed by Journal Broadcast Corporation ("Journal") in the above-captioned proceeding. Lakeshore has petitioned for reconsideration of the *Report and Order* in this proceeding. Journal filed an opposition, to which Lakeshore replied. On July 15, 2005, Lakeshore moved for acceptance of a Supplement to its Opposition. The rules do not contemplate such a supplement. See 47 C.F.R. § 1.429(f). However, if the Commission accepts the Supplement to Journal's Opposition, then Lakeshore is entitled to a reply. See 47 C.F.R. § 1.429(g). In support hereof, Lakeshore states as follows:

1. Journal points out that Cochise Broadcasting LLC, applicant for a new station at Lordsburg, New Mexico, has amended its application with different parameters than originally filed. However, this is of no decisional significance because Lakeshore's proposal still creates no "white" area. In considering whether an area has reception service, FM stations other than class C stations are analyzed *as if they were constructed with maximum facilities for their class. Greenup, Kentucky and Athens, Ohio*, 4 FCC Rcd 3843 (1989), *aff'd in pertinent part*, 6 FCC

No. of Copies rec'd 0/4
List ABCDE

Rcd 1493 (1991). This bedrock rule has been applied time and time again. See *Harrisburg and Albemarle, North Carolina*, 11 FCC Rcd 2511, ¶15 (1996) (“we believe that it is appropriate for allotment purposes to determine coverage areas, and those portions of which are characterized as loss areas, based on the use of maximum facilities”); *Elkins, West Virginia; Mountain Lake Park and Westernport, Maryland*, 6 FCC Rcd 5830 (1991), *pet. for recon. granted in part*, 7 FCC Rcd 5527 (1992) (affirming use of maximum facilities), *app. for review denied*, 10 FCC Rcd 10433, ¶ 4 (“we compare the extent of potential service to be offered, that is, the service provided using maximum facilities for the class of station”); *Live Oak and St. Augustine, Florida*, 4 FCC Rcd 758 (1989).

2. What is more, it does not matter that the licensee has no intention of *ever* upgrading to maximum facilities – for the purposes of “white” and “gray” area calculations, maximum facilities are *always* used. See *Banks, Sunriver, Redmond, and Corvallis, Oregon*, 19 FCC Rcd 10068, ¶21 (2004) (treating KFLY(FM) as a maximum Class C0 station even though it proposed operation on lesser facilities).

3. The attached map demonstrates that, using maximum facilities for all licensed facilities and construction permits (but relying on vacant allotments), the entire loss area receives coverage from one or more stations. This coverage includes a contribution from the Lordsburg application, properly analyzed as a maximum Class C1 station, and from Station KCDQ(FM), Tombstone (formerly Douglas), Arizona, as described in Lakeshore’s petition for reconsideration.

4. As set forth in Lakeshore's petition for reconsideration, this case is controlled by *Greenup, Kentucky, supra*. In *Greenup*, a proposal which originally claimed benefits under priority 2 was reversed on reconsideration because intervening changes had removed the priority 2 gains. See *Greenup*, 6 FCC Rcd at 1494, ¶9. Here, reconsideration is equally deserving because the purported defect in Lakeshore's proposal, a priority 1 loss area, has been similarly removed by intervening changes.¹

5. However, relying on the *Refugio* case, Journal believes that the FCC has changed its method of determining white area. This argument is misplaced because, as stated in previous filings, there would be far reaching effects of such an interpretation. Also, to the extent that Journal's pleading can be characterized as an argument that the *Greenup* methodology should not be followed, this is ill-advised. The *Greenup* methodology is a direct consequence of allotting FM stations by minimum distance spacings as opposed to contour protection. The minimum spacings used in creating the FM Table of Allotments grant each station, including vacant allotments, the ability to specify maximum facilities, and "there are significant economic incentives for stations to provide service to the greatest area possible for their class of station." *Greenup*, 4 FCC Rcd at 3845, ¶15. The truth of those assertions has not changed in the intervening years. For the Commission to reverse course and base reception service on actual facilities would require, at a minimum, a finding that circumstances had changed since the original rule was promulgated. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). Moreover, since the Commission has been

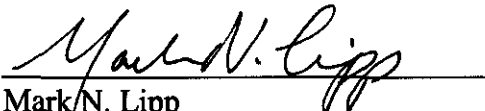
¹ As set forth in detail in Lakeshore's petition for reconsideration, Lakeshore disagrees that there was any defect in its original proposal. Under the *Greenup* methodology, vacant allotments are considered in determining whether an area has reception service. Analyzed this way, there is no "white" area created. The staff is without authority to overrule Commission precedent in this regard. Its action in denying Lakeshore's proposal was therefore arbitrary and capricious, and an abuse of discretion. Nevertheless, intervening events have averted the necessity of a decision on this point and reconsideration is appropriate.

deciding the comparative merits of allotment proposals using the *Greenup* methodology for years, a change in that methodology would call into question numerous decisions, and open them to reversal. A rule of "actual facilities" would also mean the bureaucratic creation of large amounts of "white" and "gray" area where none had previously existed, and could promote an opportunistic "land rush" of petitions and applications designed merely to take advantage of the high priority associated with its elimination. The FCC staff cannot make such a change in policy under its delegated authority. The Commission itself should not do so without a chance for comment by the public in a separate generic proceeding. Only by a separate proceeding could the wide-ranging effects on the FM priorities caused by creating numerous white and grey areas be determined.

WHEREFORE, the Commission should deny Journal's Motion to Supplement its Opposition. It should grant Lakeshore's proposal to relocate Station KWCX-FM from Willcox to Davis-Monthan Air Force Base, Arizona.

Respectfully submitted,

LAKESHORE MEDIA, L.L.C.

By: 
Mark N. Lipp
J. Thomas Nolan
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-6500

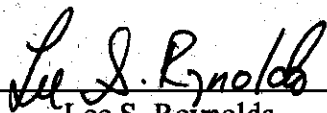
Its Counsel

July 28, 2005

Engineering Statement
KWCX(FM)
Remaining Services Study

The attached map shows the KWCX(FM) remaining services study. This map assumes maximum facilities for the application on Channel 279C1 at Lordsburg, NM and for the construction permit for KCDQ(FM) at Tombstone (formerly Douglas), AZ. FCC precedent allows for all commercial stations below class C status to be considered as a maximum facility for the appropriate class. The map does not include the 0.5 mV/m contour of KHIL(AM), 1250 kHz. When this station is considered, the entire loss area is covered with its interference-free contour.

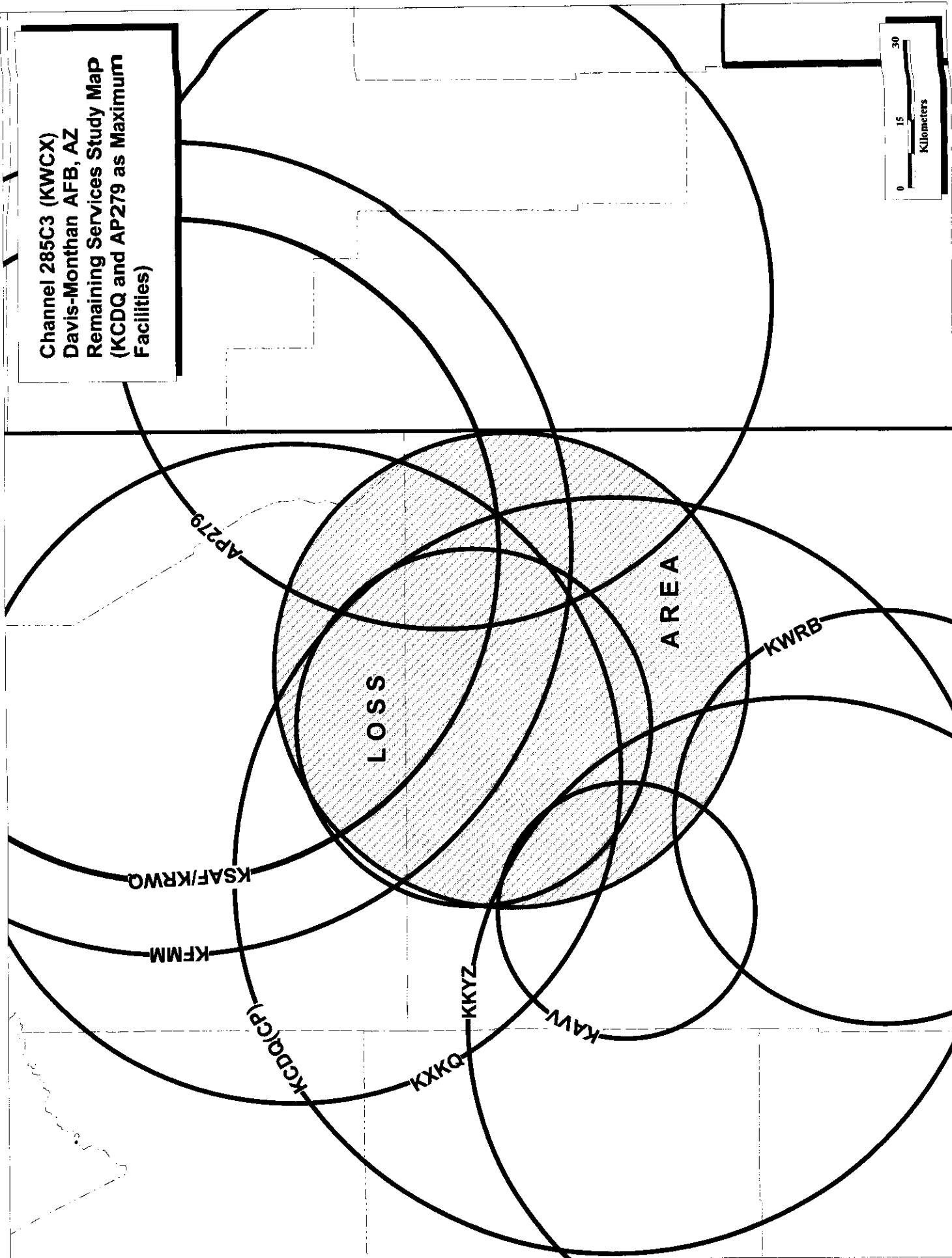
For Lakeshore Media, LLC:



Lee S. Reynolds

Reynolds Technical Associates
12585 Old Highway 280 East
Suite 102
Chelsea, AL 35043

Channel 285C3 (KWCX)
Davis-Monthan AFB, AZ
Remaining Services Study Map
(KCDQ and AP279 as Maximum
Facilities)



CERTIFICATE OF SERVICE

I, Scott Woodworth, hereby certify that on this 28th day of July, 2005, copies of the foregoing "Opposition to Motion and Reply to Supplement" were sent via first-class mail, postage prepaid, to the following:

* Victoria McCauley, Esq.
Federal Communications Commission
445 12th Street, S.W., Room 2-C222
Washington, D.C. 20554

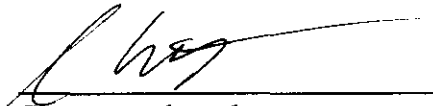
Scott Cinnamon, Esq.
Law Offices of Scott Cinnamon
1090 Vermont Avenue, N.W., Suite 800
Washington, D.C. 20005

Gregory Masters, Esq.
Wiley, Rein & Fielding, LLP.
1776 K Street, N.W.
Washington, D.C. 20006

* Hand Delivered

Rich Eyre
REC Networks
P.O. Box 40816
Mesa, Arizona 85274

Lawrence N. Cohn, Esq.
Cohn and Marks LLP
1920 N Street N.W.
Suite 300
Washington, D.C. 20036-1622



Scott Woodworth